U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-C-H- INC.

DATE: MAY 2, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a restaurant, seeks to permanently employ the Beneficiary in the United States as a customer relations supervisor. It seeks classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigration classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1152(b)(2). This "EB-2" classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Beneficiary's degree was not a U.S. degree as required on the labor certification, and that the Petitioner's evidence was not sufficient to establish that the Beneficiary possessed the minimum experience required on the labor certification for the proffered position. The Petitioner submitted a motion to reopen and reconsider, which the Director denied after finding that newly-provided evidence was sufficient to establish the Beneficiary's qualifying experience, but that the record still did not demonstrate that the Beneficiary has the minimum education required by the labor certification.

On appeal, the Petitioner asserts that the Director's decision to deny the petition was fundamentally unfair because the labor certification contained a harmless error.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, an employer obtains an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification) from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

A petitioner must establish that a beneficiary meets all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

II. ANALYSIS

A. Beneficiary's Education

The first issue is whether the Beneficiary's degree meets the minimum educational requirements of the proffered position, as required by the labor certification. The Petitioner stated on the labor certification at Section H that the offered job requires candidates to possess a U.S. bachelor of arts degree as a minimum level of the education. The Petitioner also stated on the labor certification that no foreign educational equivalent was acceptable.

The Beneficiary has a bachelor of arts degree from [redacted] University in [redacted] South Korea. The Petitioner's evidence includes the Beneficiary's certificate of graduation certificate of course completion, both of which establish that his degree is foreign degree equivalent to a U.S. bachelor's degree. However, the issue is not whether the Beneficiary's degree is the equivalent of a U.S. bachelor of arts degree, as specified on the labor certification. Rather, because the Petitioner stated on the labor certification that no foreign educational equivalent is acceptable for the proffered position, the Beneficiary's foreign degree does not establish that he meets the minimum educational requirements for the proffered position.

On appeal, the Petitioner acknowledges that it stated on Section H of the labor certification that no foreign educational equivalent is acceptable for the proffered position, but contends that because sections J and K of the labor certification show that the Beneficiary has a foreign degree and the Petitioner intends to hire him, the information on the labor certification collectively establishes that the Petitioner will accept a foreign degree as equivalent to a U.S. degree for the position. However, Sections J (Alien Information) and K (Alien Work Experience) of the labor certification relate solely to the Beneficiary's own qualifications and work experience, apart from the minimum requirements of the proffered position. The fact that the Beneficiary has a foreign degree that is equivalent to a U.S. bachelor's degree does not consequently demonstrate that the labor certification allows a foreign degree in lieu of a U.S. degree. *See, e.g., SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, *7 (D. Or. Nov. 30, 2006) (finding that even though an employer may prepare a labor certification with a beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements). As discussed, the labor certification at Section H reflects that no foreign educational equivalent degree is acceptable for the

proffered position. Had the Petitioner intended to accept a foreign equivalent degree in lieu of a U.S. degree, it could have recorded such intent on the labor certification, but did not.

During labor certification proceedings, the DOL may review a beneficiary's qualifications for an offered position. *See, e.g.*, 20 C.F.R. § 656.17(i)(3) (barring a foreign national, as of his or her hiring by a labor certification employer, from having less training or experience than is required of U.S. applicants). USCIS, however, has the ultimate authority to determine a beneficiary's qualifications for a DOL-certified position and for the requested immigration classification. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (authorizing USCIS to approve a petition after determining that "the facts stated in the petition are true" and that a foreign national qualifies for the requested preference classification). Moreover, "DOL may gauge an alien's skill level in evaluating the effect of the alien's employment on United States workers," but that "does not foreclose [the immigration service] from considering alien qualifications in the preference classification decision." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. In this case, a reading of Section H reflects that the Petitioner stated that no foreign degree was acceptable for the proffered position.

The Petitioner also contends on appeal that DOL's Board of Alien Labor Certification Appeals (BALCA) cases are applicable in this matter. *Matter of Healthamerica*, 2006-PER-1 (BALCA July 18, 2006); *Matter of Pa'Lante LLC*, 2008-PER-00209 (BALCA May 7, 2009); and *Matter of Denzil Gunnels*, 2010-PER-00628 (BALCA Nov. 16, 2010). However, DOL precedent is not binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, the cases the Petitioner cites are not analogous to this matter. For example, the BALCA panel in *Healthamerica* found that the labor certification contained a typographical error about the claimed date of job advertisement (*i.e.*, March 6 was mistakenly entered as March 7), but the Petitioner has not demonstrated that its statement that "no" foreign equivalent degree was acceptable for the proffered position was the result of a similar minor keystroke error. Similarly, in *Pa'Lante*, BALCA found that the certifying officer should have considered an employer's evidence of the Beneficiary's qualifications obtained during the course of an audit, even though the information was not provided on the actual labor certification. However, in this case, the Petitioner does not have an additional labor certification record that was developed during a DOL audit, so the evidence regarding the minimum educational requirements of the proffered position are the Petitioner's statement at Section H of the labor certification and the job advertisements, neither of which suggest that the Petitioner would accept candidates with a foreign degree. Finally, in *Denzil Gunnels*, the BALCA panel found that it was an abuse of discretion for the certifying officer to find that an employer had failed to check question M.1 on a labor certification when the same information was

otherwise provided through completion of the remainder of Section M. However, in this case, the Petitioner did not fail to check a box at Section H. Instead, it clearly stated that "no" foreign degree was acceptable as equivalent to a U.S. degree. Consequently, the Petitioner has not established that the information it provided at Section H is a clerical error or inadvertent omission of information that is provided elsewhere as in the BALCA cases it cites.

Further, there is a more analogous case from BALCA in *Matter of Sushi Shogun*, 2011-PER-02677 (BALCA May 28, 2013). In that case, the panel found that the promulgation of 20 C.F.R. § 656.11(b), prohibiting any modification to labor certifications filed after July 16, 2007, precluded the employer from making changes to the offered position on the labor certification. Like the filing in *Sushi Shogun*, the labor certification in this case was filed after July 16, 2007, and is similarly barred from modification or amendment. Moreover, as the DOL made clear in the preamble to the *Proposed Rule, Reducing Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, Permanent Labor Certification Program*, 71 Fed. Reg. 7655 (Feb. 13, 2006), "[u]nder proposed 656.11(b), DOL clarifies that requests for modification to an application submitted under the current regulation will not be accepted . . . . Nothing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing." The preamble goes on to highlight that:

> The online application system is designed to allow users to proofread and revise before submitting the application, and the Department expects and assumes that users will do so. Moreover, in signing the application the employer declares under penalty of perjury that he or she has read the application and the submitted information is true and accurate to the best of his or her knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately . . . . In addition, the entire application is a set of attestations and freely allowing changes undermines the integrity of the labor certification process because changing one answer on an application could impact analysis of the application as a whole.

Id. Here, the attempt to change the answer from "no" to "yes" for question H.9 materially changes the requirements of the offered position and impacts the analysis of the labor certification as a whole.

On appeal, the Petitioner also cited to an Eight Circuit Court of Appeals (Eight Circuit) decision that it claims held that clerical error that causes no prejudice is considered immaterial and harmless. In that case, the Circuit Court footnoted the fact that the District Court's previously unnoticed but erroneous citation to a pre-1986 version of 18 U.S.C. § 922 in the case of an armed bank robber was harmless because the post-1986 statute contains identical wording. *U.S. v. DeVore*, 89 F.2d 1330 (Feb. 26, 1988). The Petitioner has not shown how the Petitioner's declaration at Section H of the labor certification regarding the fact that it would not accept candidates with a foreign degree was similarly immaterial and harmless.

The Petitioner also cited to an additional case for the proposition that revocation of approval of an I-140 was erroneous because it was based on the Beneficiary's clerical error in a Uniform Residential Contract application and other inconsistencies. The Petitioner's citation is to *Sugule et al. v. Frazier et al.*, 614 F.3d 822 (8th Cir. 2010); however, it appears to be erroneous. The citation is to *Ginters v. Frazier*, 614 F.3d 822 (8th Cir. 2010), which involved a denied Form I-130, Petition for Alien Relative, for a sham marriage rather than a Form I-140 employment-based petition for which approval was revoked. Consequently, the Petitioner's citation does not appear to be applicable to this case.

For the reasons discussed above, the Petitioner has not established that the petition is approvable because the Beneficiary does not possess a U.S. bachelor of arts degree, as required on the labor certification.

B. Beneficiary's Experience

As an additional matter, despite the Director's conclusion to the contrary, the record does not contain sufficient evidence to demonstrate that the Beneficiary has the minimum experience required for the proffered position on the labor certification. At Section H of the labor certification, the Petitioner stated that the proffered position of customer relations supervisor requires a minimum of five years of experience in a managerial position in the hospitality or restaurant industries. At section K of the labor certification, the Beneficiary claimed to have worked in South Korea as a service team manager for [redacted] for four years from July 1, 2006, to July 1, 2010, and then as a manager for [redacted] from February 21, 2011, to February 21, 2012.

A petitioner must support a beneficiary's claimed qualifying experience with a letter from a former employer that provides the name, address, and title of the employer, and a description of the beneficiary's experience. 8 C.F.R. § 204.5(l)(3)(ii)(A). The Petitioner provided letters from [redacted] and [redacted] Each employer attested that the Beneficiary worked for it in the position and for the dates claimed on the labor certification. However, the record also contains evidence showing that on May 2, 2016, the Beneficiary filed a Form I-485, Application to Register Permanent Residence or Adjust Status, and included a Form G-325A, Biographic Information.[2] On the Form G-325A, the Beneficiary was asked to list his employment for the last five years and stated that he had "none." He also listed no foreign employment on the form where he was required to list his last occupation abroad. The Beneficiary's claim on the Form G-325A that he had not worked within the five-year period prior to filing the form contradicts his claims on the labor certification to have been employed at [redacted] during that same five-year period. Moreover, his failure to list any occupation abroad does not support his claim on the labor certification to have been employed abroad by at least two entities in South Korea, *i.e.*, [redacted] and [redacted] Based on this contradictory information, the record does not support the Petitioner's claim that the Beneficiary has at least five years of qualifying experience in a managerial position for the hospitality or

[2] Although the Beneficiary filed the Forms I-485 and G-325A with USCIS on May 2, 2016, he had post-dated his signatures on both forms to show, incorrectly, that he signed them on May 6, 2016.

restaurant industry, as required on the labor certification. In any future filings in this matter, the Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho;* 19 I&N Dec. 582, 591-92 (BIA 1988).

III. CONCLUSION

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary possesses the minimum education for the proffered position in the form of a U.S. degree. Accordingly, the Petitioner has not established the Beneficiary's eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of D-C-H- Inc.*, ID# 1228205 (AAO May 2, 2018)